DOCUMENT RESUME

ED 284 634 JC 870 364

TITLE	Understanding the Condemnation Process in Texas. Teachers Instructional Packet, TIP No. 8, Fall 1985.
INSTITUTION	Texas A and M Univ., College Station. Texas Real Estate Research Center.
PUB DATE	85
NOTE	55p.; For other Teachers Instructional Packets in this series, see JC 870 357-372.
AVAILABLE FROM	Texas Real Estate Research Center, Texas A & M University, Blocker Bldg., College Station, TX 77843 ($2.00).
PUB TYPE	Guides - Classroom Use - Guides (For Teachers) (052)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Business Education; *Court Litigation; Federal Aid; Instructional Materials; Postsecondary Education; *Real Estate; Real Estate Occupations; State Action; State Government; *State Legislation; Teaching Guides
IDENTIFIERS	*Condemnation (Real Estate); *Eminent Domain; Texas

ABSTRACT

Part of a series of classroom aids designed for real estate instructors, this instructional packet was developed to help real estate students understand where the power to condemn property comes from, which entities have this power, what the condemnation procedure is in Texas, and how property rights are best protected. First, information about the condemnation process is presented. Introductory material explains what condemnation is; the relationship between the concepts of eminent domain and condemnation; and the right of the federal and state governments to exercise the power of eminent domain. Section I describes legal restraints on condemnation, focusing on provisions related to public use, public necessity, just or adequate compensation, and due process. Section II explains the landowner's alternatives when confronted with condemnation, covering monetary considerations, procedural options, provisions of easement agreements, and other alternatives that landowners may find useful when negotiating an easement. Following this section are three handouts which list steps in the condemnation process, provide a glossary of terms, and explain the jurisdiction of Texas courts in eminent domain cases. Finally, a series of 19 overhead masters keyed to the text and an evaluation form for the instructional packet are provided.

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED284634

TEACHERS INSTRUCTIONAL PACKET
TIP No. 8
Fall 1985

UNDERSTANDING THE CONDEMNATION PROCESS IN TEXAS

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

R. LYON

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Texas Real Estate Research Center
College of Agriculture
Texas A&M University
College Station, Texas 77843-2115

JC 870364

This packet is designed to help real estate students understand the condemnation process in Texas. The content and materials may be modified as the instructor deems appropriate. Reproduction of materials for student use is encouraged.

TIPS on the TIP

This Teachers Instructional Packet (TIP) is designed to provide the real estate instructor with a classroom aid. Packets have been reviewed carefully, but there is always room for improvement. Your suggestions are welcome.

Introduction to TIP-8

TIP-8 has been developed to help students understand the condemnation process in Texas. This material is provided as a **supplement** to existing course content. It is not a pat presentation. Instructors should use this material in whatever way best fits their needs.

NOTE: Copies of the TRERC technical report, "Understanding the Condemnation Process in Texas," have been provided to Texas lead real estate instructors. Additional copies are available for $1 each ($2 for out-of-state residents). Request publication No. 394. Tierra Grande summaries, "Condemnation and Compensation," are available for 25 cents each. Ask for publication No. 416. Instructors may reproduce TRERC reports in full or in part providing no changes are made in the content and providing TRERC is cited as the source.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
LEGAL RESTRAINTS	3
Public Use	3
Public Necessity	3
Compensation	4
Due Process	8
WHEN CONFRONTED WITH CONDEMNATION	12
Monetary	12
Procedural	13
Terms of the Easement Agreement	17
Miscellaneous	22
CONCLUSION	25
STEPS IN THE CONDEMNATION PROCESS (Handout A)	26
GLOSSARY OF TERMS (Handout B)	27
JURISDICTION OF TEXAS COURTS (Handout C)	30
VISUALS	31

UNDERSTANDING THE CONDEMNATION PROCESS IN TEXAS

The appropriation of private property by the government against the will of the owner sounds contrary to the policy of property rights adopted in this country. However, it can happen legally through a process known as condemnation. Many property owners are not aware of their rights when faced with condemnation and thus fail to act in their own best interests.

This publication explains where the power to condemn comes from, which entities have this power, what the condemnation procedure is in Texas and how property rights are best protected.

VISUAL #1
Understanding Condemnation

It should be noted that the taking of property by way of condemnation can sometimes be averted. One way is to discover a procedural error; another is to enter an out-of-court settlement. Both these alternatives, and more, will be discussed.

The terms eminent domain and condemnation are often used interchangeably, but they are not synonymous. There is an important legal distinction. Eminent domain is defined as the power of the sovereign (or government) to take private property for a public use. Condemnation is the procedure by which the taking or appropriation occurs. Thus the former is the power; the latter is the process. Only those entities on whom the power has been properly conferred may put in motion the procedure for condemning.

VISUAL #2
Eminent Domain and Condemnation

The power of eminent domain in this country is a bit unusual in that it is inherent or implied. Neither the Federal nor Texas Constitutions contain explicit grants of this power. Instead the law assumes or implies the power exists in the government whenever a public use will be derived.

By the same token, the exact procedure for condemnation is not addressed by either constitution. Only certain limitations on the process are enumerated. For instance, the Federal Constitution states that "due process" must be insured and "just compensation" must be paid to the owner. The Texas Constitution provides that only "adequate compensation" must be rendered. Due process, as pronounced in the Federal Constitution, applies to all states under the Fourteenth Amendment of the U.S. Constitution. However, this constitutional guarantee does not insure the citizen of every state a particular form or method of condemnation--only that reasonable notice and reasonable opportunity to be heard and to present a claim or defense must be provided. The general procedure of condemnation followed in Texas is found in Title 52 of the Texas Revised Statutes.

VISUAL #3
Right to Exercise
Eminent Domain

The right of the federal government to exercise eminent domain within any state is not subject to control by the state legislature. It is subject only to the Federal Constitution and the statutes emanating from it. This report will not include any discussion of the federal government, its agents or other entities delegated the power to condemn land in Texas under federal law.

The right of any entity, be it governmental or non-governmental, to exercise the power of eminent domain must be authorized by statute. There can be no taking of private property against the will of the owner without a legislative directive. The myriad of statutes on both the federal and Texas level delegating this power is beyond the scope of this report. Regardless of the entity having the power to condemn, the prescribed procedure is somewhat similar. This report focuses on the condemnation of pipeline and utility easements because of the quantity of Texas land that will be exposed to this process.

I. LEGAL RESTRAINTS ON CONDEMNATION

VISUAL #4
Legal Restraints

Condemnation is subject to four restraints: (1) public use, (2) public necessity, (3) just or adequate compensation and (4) due process.

1. Public Use

Public use is difficult to define. No hard and fast rule has been drafted for determining public use in every instance. Instead, each case must be decided on its own merits and the surrounding circumstances. It is sufficient to say that if there results to the public some definite right or use in business or undertaking to which the condemned property is devoted, public use has been achieved.

2. Public Necessity

Public necessity pertains to the amount of land that can be condemned. The legislature may not authorize, and the condemnor may not legally condemn, more property than is reasonably required to serve the public use. However, the condemnor's determination of the necessary amount of property is conclusive in the absence of fraud, bad faith or gross abuse of discretion. By the same token, absent some constitutional or statutory restraint, the location chosen by the condemnor is final without the showing of bad faith, fraud or an arbitrary or capricious act. Consequently, the condemnor has much latitude in determining the public necessity.

It is important to note that a Texas statute does limit the type of estate that can be condemned. Article 3270 of the Texas Revised Statutes provides that, as a general rule, no fee simple estate may be condemned except where expressly provided by law. To pipeline and utility companies, this rule generally limits their condemnation to no greater interests than an easement.

An easement is defined as a right given to an individual, agency or company by a landowner to make a limited use of a portion of the land for a special purpose. The landowner is not divested of title, only of a particular use of the land.

3. Compensation

As to the element of compensation, Article 1, Section 17 of the Texas Constitution provides "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money..."

The word "property" as used in the context of the constitution has been construed to mean not only the physical area being condemned but also every right that accompanies and is incidental to it. In the case of the condemnation of an easement, the "property" would include the land subject to the easement plus every interest, both tangible and intangible, attached to it.

Although the Texas Constitution speaks in terms of "adequate compensation," the Texas statutes refer to compensated damages in terms of "market value." Market value has been further defined in case law as "the price the property will bring when offered for sale by the one who desires to sell, but is not obligated to sell and is bought by one who desires to buy, but is under no necessity of buying." (See State v. Carpenter, 89 SW2d 194,202, Ct. of Civil App., 1936.)

Because the sale must be free and voluntary, settlements of condemnation awards are not admissible evidence. Likewise, the sales must be so situated in terms of character, location and time that they are relevant to the

proceedings at hand. The question of relevancy lies primarily with the presiding judge. It has been held that sales occurring in the vicinity six years earlier were admissible. Also, the appraised value of land recently subject to inheritance taxes is admissible. However, the value of the property should be adjusted to the time of the taking. Consequently, any enhancement in value from the time of comparable sales to the time the condemnee is divested of possession should be considered in the award.

The issue of market value is not necessarily determined by current usage. Texas law permits the consideration of the highest and best use to which the land can reasonably be adapted in ascertaining market value.

The statutory method for establishing market value depends on (1) whether all of the property owner's land in a certain tract is being condemned or (2) whether only a portion of the tract is being taken.

Article 3265, subsection 2 of the Revised Statutes of Texas deals with the first situation. It states, "When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be a market value of the property in the market where it is located ..."

Two different approaches are employed when a partial taking occurs. Article 3265, subsection 3 contains the procedure used most often. Basically it provides that the determination of damages will be made in three stages: (1) the fair market value of the parcel being condemned, (2) the damages occasioned to the remaining uncondemned land by reason of the taking (sometimes known as special damages) and (3) the enhanced value to the remainder of the land due to the taking (sometimes known as special benefits).

VISUAL #5
Damage Determinations

Special damages sometimes are referred to as "resulting damages, damages to the remainder, consequential damages, or severance damages." All these terms and phrases refer to the decrease in the remaining land's value stemming from the partial severance. Depending on the circumstances, these damages could include such things as loss of frontage, loss of access to road or highway, loss of access to pastures, loss of access to a source of water, loss of natural drainage, cost of fencing or refencing certain areas, cost of restoration of property, cost of cleaning up and other similar expenses.

Special benefits or special assessments are the opposite of special damages. Special benefits are the increases in value to the remaining uncondemned land resulting from a partial severance. Again, depending on the circumstances, these benefits could include such things as increases in values due to the leveling of rough land, draining of swamp land, overall drainage improvement, improved accessibility, adaptability of the remaining land to higher and better uses and other similar benefits.

The court determines the final award by adding the market value of the condemned land to any special damages and subtracting any special benefits. If the special benefits exceed the special damages, it would appear that the final award could actually be less than the market value of the parcel taken. This cannot happen under Texas law.

In Texas, as in most other states, the special benefits accruing to the remaining land may be offset only against the special damages and not against compensation due for the land taken. Texas landowners will not receive less in compensation than the value of the condemned parcel. The matter of assessing special damages and

special benefits may be avoided entirely if the landowner waives all rights to special damages at the beginning of the proceedings. This precludes the admissibility of any special benefits into evidence.

The other approach of assessing market value for a partial taking is called the unity-of-use submission. Theoretically, this method results in the same figure for the market value as the method just described. The Texas Supreme Court approved this method in cases where a tract of land commands a higher value when considered as a whole rather than in parts. (See Uselton v. State, 499 SW2d92, TX. S. Ct., 1973.)

The procedure begins with establishing the value of the complete tract, then the part being condemned. The difference in the two figures yields the value of the uncondemned land before the taking. Next the value of the uncondemned land after the taking is determined. (This figure includes any special damages.) The difference between the uncondemned land before and after the taking is then added to the value assessed on the condemned tract. The sum of these two figures yields the compensation due the landowner.

Another element of compensation not directly related to the value of the condemned land is relocation expenses administered under the Relocation Assistance Program found in Article 3266b of the Texas Revised Statutes. The program is patterned after the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Program. Basically, the law allows certain monetary assistance for moving and relocating individuals, families, property of business concerns, farm or ranch operations and non-profit organizations displaced by the condemnation of their real property.

Also, Article 3265(7) allows for reasonable moving expenses of personal

property being transferred from a place of residence or business to another. This allowance can be granted only if the landowner is physically and permanently displaced from his dwelling or place of business. The maximum distance for remuneration of a move is 50 miles and the amount cannot be greater than the market value of the personal property being relocated.

4. Due Process

Due process is a constitutional directive levied against each state. Basically, the condemnee must be provided a reasonable notice and a reasonable opportunity to be heard and to present a claim or defense. These conditions are satisfied in the general condemnation procedure adopted in Articles 3264 through 3266 of the Texas Revised Statutes. The procedure is divided into three phases or parts: (1) the negotiation between the condemnee and the condemnor, (2) the hearing before the special commissioners and (3) an appeal, if any, from the special commissioner's award.

VISUAL #6
Due Process Procedures

The first phase is completely without judicial involvement. The condemnor is required by law to make a bona fide attempt to purchase the property from the landowner. Only after the parties have failed to agree on the amount of compensation can the condemnor begin judicial proceedings. However, no effort to purchase need be made if it is clear the parties could never agree or if the attempt would be futile because the owner suffers under some legal disability. Likewise, where several persons have an undivided interest in the land, failure to agree with any one of them is sufficient cause for the condemnor to petition the court.

It is interesting to note that only a bona fide attempt to negotiate market value must be made. The elements regarding the terms of the agreement,

location of the easement, the amount of land taken and similar issues must be disregarded at this point of the condemnation process.

Phase two begins when the condemnor petitions the court following a failure to agree on market value. The court petitioned will either be the county court at law or, if there is none, the district court. According to Article 3266a(1) of the Texas Revised Statutes, no county court shall have jurisdiction in eminent domain cases. (See page 36 for statutes regarding the jurisdiction of the various courts.) The petition must contain four essential elements: (1) a description of the land, (2) a statement of the purpose for which the land is being condemned, (3) the name(s) of the owner(s) if known and (4) an allegation that the parties have been unable to agree on the value of the land. If any one or more of these elements are defective or absent, the proceedings can be dismissed.

VISUAL #7
Elements of a Court Petition

After the petition has been filed, the judge will appoint three disinterested freeholders or landowners in the county (giving preference to those agreed on between the parties) as special commissioners to assess damages. The special commissioners will be sworn to assess damages fairly, impartially and in accordance with the law. After this, the special commissioners will set a time and place for hearing the parties. The hearing must be held at the earliest practicable day and in a place as near as practicable to the property in question.

Notices of the hearing, issued by the special commissioners to each interested party, shall be served upon them at least ten (10) days (excluding the day of service) prior to the date of the hearing. If the interested party is a minor, deceased or legally disabled, a legal representative shall be served the notice. If the interested party is not

a resident, is unknown or elects to hide, the notice may be served by publication.

The hearing conducted by the special commissioners is informal. The Texas Rules of Civil Procedure do not apply; hence, landowners may represent themselves without the aid of an attorney. The special commissioners have the power to compel the attendance of witnesses for the production of testimony, to administer oaths and to punish for contempt. The only issues the special commissioners can legally determine, however, are market value, special damages and special benefits. Again, the propriety of the taking cannot be questioned at this stage. When the special commissioners have reached a decision, their assessment is placed in writing, dated, signed and filed with the judge having jurisdiction. If a mutual accord among the special commissioners cannot be reached, the majority--two out of three--control.

VISUAL #8
Special Commissioners Hearing Determines:

The third and final phase begins with an appeal, if any, from the special commissioner's award. If either party is dissatisfied with the award, that party must file formal written objections with the appropriate judge before the first Monday following the twentieth (20th) day after the filing of the special commissioner's award. The proceedings then become a matter for a trial in the county court at law or district court. The case will be tried solely before the judge unless a jury trial is requested. If a jury is convened, it will be composed of six jurors. If objections are not filed within this designated period, the award becomes final and unappealable.

VISUAL #9
Appellate Procedures

The appellate trial at the county or district court is quite different from the commissioner's hearing. Here the Texas Rules of Civil Procedure apply. Consequently, an attorney will

be needed to represent the landowner. Also, the judge may sit with a six-member jury. The jury will determine the facts--namely, the amount of damages. The judge will determine the legal propriety of the taking if brought into issue. This is the first time the question of the taking can be legally raised and determined. And lastly, the appeal is de novo. This simply means that a complete, new trial will transpire. No evidence of the prior special commissioner's hearing, including the final award, is admissible. The special commissioners may even be called as witnesses.

Before going to the special commissioner's hearing and also before appealing the special commissioner's award, it would be helpful if the landowner was aware of some facts. First, any fees the landowner incurs throughout the proceedings, such as attorneys' fees or appraisers' fees, generally must be borne by the landowner. Landowners can never recover these expenditures from the other party except in limited circumstances. Secondly, should the final award from either the special commissioners or the trial court be less than or equal to the condemnor's offer to the landowner before the proceedings, the landowner must pay, in addition to his attorney's and appraiser's fees, all court costs. However, if the award from either the special commissioners or trial court is more than the condemnor's offer, the condemnor must pay all court costs but not the condemnee's attorney and appraiser fees.

VISUAL #10
Landowner Costs

And finally, it would be helpful for the landowner to know that the condemnor can take possession of the land any time after the special commissioners file their award with the judge having jurisdiction. This is true whether the special commissioner's award is appealed or not. To take possession, the condemnor must first post the amount

of the special commissioner's award with the court clerk or give it to the landowner. In addition, the condemnor must post with the court clerk a sum (1) equal to the award or (2) a surety bond for the same amount. Also, the condemnor must execute a bond with two or more sureties with the same clerk. The added security is to insure an adequate source of collateral for any subsequent damages that may be adjudged against the condemnor.

If the landowner intends to appeal the case, it would be wise to refuse acceptance of any part of the award but rather to have all the award posted with the court clerk. By either accepting the money or by drawing down the posted award, the only issue the court can address on appeal is the amount of monetary considerations due the landowner from the taking. The issue relating to the propriety of the taking is forfeited thereafter. Also, any objections to prior procedural irregularities are waived.

II. WHEN CONFRONTED WITH CONDEMNATION

The following items are some alternatives landowners have when all or a part of their land is being considered for condemnation. For convenience, the alternatives have been divided into four categories. They are: (1) monetary, (2) procedural, (3) provisions of the easement agreement and (4) miscellaneous.

VISUAL #11
Landowner's Alternatives

1. Monetary

Many times the sole issue on which landowners concentrate is the amount of payment they will receive. This is a natural inclination since the first two stages of the condemnation process, as just described, are limited to this question. However, the landowner may choose to focus on the provisions of the easement agreement rather than striving entirely for a higher payment.

Since the burden of proving market value and special damages lies with the landowner, an appraiser and possibly an attorney are indispensable. However, professional fees are not generally recoverable in any judgment. Hence, the landowner could easily become a net loser if the fees are not offset by a higher award. Finding an attorney who would take the case on a contingency fee basis is one alternative to the dilemma.

To ascertain whether to employ professionals, the landowner may wish to find out what the special commissioners and the prior trial courts have awarded for comparable land in the area. Also, landowners may compare compensations with other landowners. If the condemnor's offer appears to be similar to these figures, the landowner may wish to concentrate on the provisions of the easement agreement.

2. Procedural

Procedures can be undertaken by the condemnee to insure due process to the letter of the law. Many of the items listed below can be cured by the condemnor and the condemnation process continued. These procedures may improve the landowner's chances of getting a more favorable out-of-court settlement.

a. Before attempting to negotiate, the landowner may choose to check the authenticity of the condemnor's power of eminent domain. In all probability, the condemnor possesses such power due to the frequency with which it has been delegated in Texas.

For example, Section 111.00 et. seg. of the Texas Natural Resources Code is one of the empowering statutes for pipelines. Generally, any company or corporation qualifying as a common carrier in Texas has the right to enter and condemn all or part of land, rights-of-way and easements. This right

extends to the property of any person or corporation, if the property is necessary for the construction, maintenance or operation of the common carrier pipeline.

To qualify as a common carrier, the company or corporation must be in the business of transporting oil, gas or coal for public hire. However, the power to condemn applies only to property necessary for the pipeline transportation system, and does not apply to property for equipment used for other purposes.

In addition, natural gas, electric current and power corporations in Texas have the right and power to enter, condemn and appropriate land, rights-of-way and easements. This right also extends to the property of any person or corporation, if the property is necessary to operate lines at and between different points in Texas as is necessary for its purposes. The statute delegating this right is located in sections 1435 and 1436 of the Texas Revised Statutes.

Although common carrier pipeline companies and gas or electric power companies must follow the same general procedure for condemning private land, common carrier pipeline companies must get a permit from the Railroad Commission of Texas before operating any pipeline or gathering system in this state. Rule 70 of the Texas Railroad Commission was implemented to insure that any proposed lines will be laid, equipped and managed to reduce the possibility of waste and to insure compliance with the conservation laws and rules of the Commission.

In cases where the condemnee challenges the right of the company to condemn the property, the condemnor must show that a determination of convenience and necessity to serve the public has been made for the project in question by

the governing body, the board of directors or other authority having the power to speak and act for the condemnor. The determination must be shown by some affirmative action such as a resolution from the board of directors declaring the convenience and necessity or other similar actions. When challenged by the condemnee, the condemnor must be prepared to introduce such evidence to establish the jurisdiction of the court.

b. A frequently asked question is "When is the condemnor legally allowed to enter and survey the land?" In the statutes just cited, the law gives the companies the right to enter and condemn. Generally, the right to enter arises whenever the condemnor first proposes to take the land. Some landowners have objected and forcibly rejected condemnors' attempts to enter their land. However, the condemnor can get a temporary or permanent restraining order to prevent the landowner from interfering with the condemnor's activities.

Before a condemnor enters to begin any actual operations, the landowner may choose to document the condition of the property with comprehensive photographs of the area.

c. To properly insure due process, the landowner may check the condemnor's adherence to the following statutory procedural guidelines.

1. The initial petition filed with the court contained these four essential elements: (1) description of land, (2) statement of purpose for the taking, (3) name or names of owners, if known and (4) allegation the parties have been unable to agree upon value of land.

2. The condemnor made an affirmative determination of convenience and necessity to serve the public for the particular project in the passage of a resolution by the board of directors or some other similar means.

3. Notices were given to all parties and served at least 10 days in advance of the special commissioners hearing.

4. All the special commissioners were sworn in before the hearing began.

5. At least two of the three special commissioners concurrred and signed the final award.

6. The special commissioners award was filed with the appropriate judge and not with the court clerk.

d. If possible, some effort to determine the judge's appointments to the special commission should be made.

Article 3264(2) of the Texas Revised Statutes states that these appointments shall be made giving preferences to appointees that may be agreed upon between the opposing parties. If the parties cannot agree, the judge may appoint the special commission without giving preference to either party.

However, some judges will allow each party to appoint a special commissioner with the judge's consent, and the judge appoints the third commissioner. There is no legal compulsion for this procedure.

The importance of who sits on the special commission cannot be overemphasized. Recently Article 3265 of the Texas Revised Statutes was amended to curb a practice of some

condemnors who dismissed a condemnation action in order to get it re-tried before a different combination of special commissioners. Article 3265(6) states that if the condemnor dismisses the action before the commissioners make an award, the landowner shall be allowed all necessary and reasonable fees for attorneys, appraisers and photographers and all other expenses incurred to that time.

If the condemnor dismisses the condemnation suit after the commissioners have made their award, the landowner again is entitled to recover the same fees and expenses as previously described. The condemnor cannot file again to condemn the same or substantially the same land in an effort to secure a lower award from a second special commissioners hearing. Instead, if a second petition to condemn the same or substantially the same land is filed, the landowner gets three times the amount of all expenses and fees allowed in the first dismissal, and the court will automatically enter the first special commissioner's award as the award for the second petition filed by the condemnor.

3. Provisions of the Easement Agreement

The negotiation of the terms of the agreement possibly is the most important aspect of the condemnation process. The agreement will govern the rights and duties of the parties long after the condemnation is finished. Since an easement or right-of-way constitutes an interest in land, it is imperative all aspects of the agreement be placed in writing. Section 26.01 of the Texas Business and Commerce Code provides that no promise or agreement involving a contract for the sale of real estate is enforceable unless the promise or agreement is in writing and is signed by the person to be charged with the promise or agreement.

Many of the following items cannot be included in the agreement if the condemnor takes the issue of market value to court. The landowner may attempt to negotiate some of the items in lieu of a possible higher award if the matter is taken to court.

The following checklist may be used by the landowner as a guide for negotiations.

VISUAL #12
Landowner Negotiation Checklist

a. Is the proposed location of the easement or right-of-way for the pipeline or utility line accurately described in the agreement. Check the agreement to insure it contains more than just the legal description of the total property. Otherwise the condemnor may choose to place the utility line anywhere on the described property.

b. Pay particular attention to the width of the easement or right-of-way. Some landowners prefer to negotiate two easements--one a fairly wide, temporary working easement and the other, a narrower, longer-term easement. Make sure these easements are surveyed and clearly marked before operations begin.

c. Does the agreement grant a permanent easement? Any easement, permanent or not, will revert to the landowner when abandoned. However, to prove abandonment in Texas, the landowner must show the owner of the easement ceased to use it with the intent never to use it again. The intent of a pipeline or power company may be hard to prove. Consequently, some landowners prefer to have the agreement state the easement would revert back to the landowner when not used for a certain length of time.

VISUAL #13
Negotiation Checklist
(continued)

d. Obtain a construction timetable in writing if possible. To achieve the least interference, schedule construction to coincide with periods when the landowner is not using the land. By having a timetable, the landowner can "work around" the condemnor's operations.

e. Check the agreement for the condemnor's routes of ingress and egress. If not stated, the condemnor can use any convenient route or routes. The landowner may explore the possibility of the condemnor constructing and maintaining certain types of access roads. Does the agreement specify all roads used by the condemnor will be repaired to their former condition or improved when the construction is finished?

f. Will gates and/or cattleguards be constructed where the routes of ingress and egress enter and leave public roads? Most landowners prefer to keep gates locked where public trespass is a potential problem.

g. Will gates and/or cattleguards be constructed where the easement crosses fence lines? Will fences be well braced before they are cut?

h. Will temporary crossings be provided across open trenches or ditches?

i. As to the condemnor's actual use of the easement, the following items may be considered:

VISUAL #14
Condemnor's Use of Easement

1. The number of pipes or lines to be laid or placed within the easement

2. The size of the pipes to be laid

3. The maximum pressure or voltage the line or lines can transmit

4. The depth pipelines must be buried

5. Substances pipeline will transport

6. Additional pipes or lines to be laid or placed in the easement and further payments or additional damages

7. Replacement of original pipes or lines and additional payments or damages

8. Maintenance and inspection schedules to be followed by the utility company (some landowners prefer to maintain the easement themselves)

9. Above-ground facilities to be built and their locations

VISUAL #15
Location Factors

10. The manner trenches or ditches will be backfilled and compacted (some landowners state that only topsoil will be used to backfill the trench and a certain extra overburden of topsoil will be maintained for a given period of time to accommodate settling)

11. Cleaning and restoring the easement (Generally, the landowner will want all trees, bushes and debris disposed of and rocks exceeding a certain size in diameter removed. Likewise, the landowner will want the land restored to its former condition, including depth and fertility of topsoil, as soon as practical after the operations cease.)

12. The type of electrical support structures to be used, single pole versus multibase supports, (this should have some bearing on the amount of compensation due the landowner)

13. The precise location of electrical support structures (landowners want them in places where they may least interfere with farming or ranching operations)

14. The height of the power lines transversing the property (landowners want them placed at heights that cause minimum interference with aerial seeding, crop-dusting or similar operations)

15. Locations of any above-ground structures such as test leads, markers and valves (landowners want them in places where they least interfere with their operations).

j. An indemnity provision in the agreement may protect the landowner against any future lawsuits. An indemnity agreement provides that the condemnor will save and hold harmless the landowner against any legal causes of action levied against the landowner due to the condemnor's activities both on and off the land. The indemnity would be against both judgments and any legal fees incurred by the landowner in defense of a suit.

VISUAL #16
Indemnity and Assignment Factors

k. Generally, the terms of the agreement will state the condemnor's right to assign interest in the easement to a third party. If such provisions are present, some notice provision to inform the landowner of such an assignment may be included. Further, state that any assignment of rights must strictly comply with the original easement agreement and cannot increase its burden.

l. Payments coming to the landowner reflect three elements: (1) payment for the easement, (2) payment for damages to crops,

VISUAL #17
Elements of Landowner's Payments

timber, etc., located within the easement and (3) payment for damages to crops, timber, etc., located outside the easement. Determine how the payments will be divided between the landowners and the surface tenant.

m. Is the condemnor liable for potential payment of damages for up to three years after the work is completed? If so, this will insure the land is properly filled when settling occurs, spots of erosion are carefully tended, injured trees that die later are paid for and other similar occurences are compensated. The statute of limitations in Texas for these events is only two years unless specified in the agreement.

n. Is the condemnor liable for the payment of all survey and filing fees incurred incidental to the condemnation?

o. What usage can the landowner make of the surface area within the easement after the construction is completed? Generally, the landowner should be able to use the surface in any way that will not interfere with the condemnor's activities.

p. One possible determinant of the price is the size and number of pipes or lines laid within the easement. For instance, the Oklahoma Wildlife Commission charges a set fee per rod for each pipe between one to six inches in diameter. For pipes exceeding six inches in diameter, a surcharge of fixed amount is added. Likewise for power lines, the Oklahoma Wildlife Commission charges so much per rod for the easement, so much for a single pole, so much for a double post and so much per guy wire.

q. Above all, remember to place all the details of the agreement in writing. Oral agreements for the most part are unenforceable.

4. Miscellaneous

The following items are other alternatives the landowners may find useful when negotiating an easement. No attempt has been made to rank them in the order of their importance.

a. Has the payment or award been apportioned between the payments received for the acquisition of the actual easement, for special damages (if any) and for special benefits (if any)? The reason for this is twofold.

First, there is a different tax treatment afforded each of the payments. For instance, payments received for the easement itself are first applied against the cost or adjusted basis of the land condemned as a nontaxable return of capital. Should the payment exceed the landowner's cost of adjusted basis, the excess is taxable if qualified replacement property is not purchased within a stipulated period. (See sections 1033 and 1231 of the Internal Revenue Code and Revenue Ruling 73-161).

Special damages, on the other hand, are applied first against any expenses incurred by the landowner in securing the severance damages. This would include such things as fees for attorneys, appraisers or photographers. Any excess received above fees is applied in the following order until the balance is depleted:

1. Against any special benefits received on the remaining uncondemned land

2. Against restoration costs or replacement property

3. Against the basis in the retained property

4. Any remaining special damages above these items then become taxable to the recipient.

If there is no apportionment of the payment or award, the lump sum is presumed for tax purposes to be a payment solely for the acquisition of the easement. (See IRS Revenue Ruling 59-173).

Secondly, should the dispute over value wind up in court, the appellate process may be made easier by arranging an apportionment. Suppose a landowner is satisfied with the award for the easement but dissatisfied with special damages. Unless an apportionment has been made, the landowner cannot appeal this single issue without appealing the total award.

b. When negotiating with a condemnor, landowners may expect to defend their positions and be supported with pertinent facts. If the key issue centers on price, then current area market data and appraising services may be essential.

VISUAL #18
Negotiating Posture

c. Be reasonable, be fair and be courteous at all times.

d. Resist the temptation of telling an over-aggressive or discourteous representative of the condemnor, "We'll settle this matter in court." As long as a bona fide attempt is being made to negotiate price, no judicial proceedings can be instituted. Once judicial proceedings begin, the condemnor can take possession of the land any time after the special commissioners post their award. By cutting off negotiations, the landowner may be doing the condemnor a favor.

e. Strive, within reason, to get a favorable out-of-court easement agreement. As stated earlier, many of the items discussed in the prior section cannot be obtained once the matter goes to court. Some of those items might be worth more in the long run than a present higher payment.

f. Be cooperative with advanced survey and construction crews. Do not try to block their efforts as long as they are not conducting their operations negligently. However, do not forget to take comprehensive photographs of the area before, during and after their operations to authenticate any claims that may arise.

CONCLUSION

VISUAL #19
Conclusion

The condemnor's rights are paramount to those of the condemnee. However, the sooner landowners act, and act properly to protect their interests, the larger their choice of alternatives.

The sole intent of this report is to inform landowners about the power of eminent domain and the process of condemnation as they are applied and followed in Texas. Also some items have been included for landowners to consider when faced with condemnation. This report is not meant to, nor will it, substitute for competent legal counsel or a competent land appraiser.

STEPS IN THE CONDEMNATION PROCESS

STEP	EVENT
First:	Certificate of Public Convenience and Necessity determined by condemnor.
Second:	Advance survey crews may enter condemnee's land.
Third:	Bona fide negotiations are conducted between condemnee and condemnor concerning compensation for land to be taken.
Fourth:	If condemnee and condemnor cannot agree on amount of compensation, the condemnor petitions court to condemn land.
Fifth:	A three-person special commission is appointed by judge to conduct infomal hearing on compensation due landowner.
Sixth:	Special commissioners send a 10-day notice of hearing to all interested parties.
Seventh:	Hearing conducted.
Eighth:	Special commissioners determine and post compensation due landowner with judge. (Two of three special commissioners must concur.)
Ninth:	Condemnor can take possession of land by posting proper security with court.
Tenth:	The landowner or condemnor may appeal special commissioner's award before the first Monday following the 20th day after the special commissioner's award is filed.
Eleventh:	If appealed, a full-blown formal trial is then conducted. A six-person jury may be asked for to determine the facts in the case.

GLOSSARY OF TERMS

APPROPRIATION

The taking of private property for public use in the exercise of the power of eminent domain.

ASSESS

To fix the amount of the damages or the value of certain property.

ASSIGNMENT

The transfer of property or property rights to another.

BONA FIDE

In good faith; honestly, openly, sincerely, without deceit or fraud.

CONDEMNATION

The process by which property of private owners is taken for public use, without their consent, but upon the award and payment of just compensation.

COMPENSATION

The equivalent in money for a loss sustained; renumeration or satisfaction for injury, damage or loss incurred.

CONDEMNEE

The person whose property is being taken by condemnation.

CONDEMNOR

The person or entity taking private property through condemnation.

DE NOVO APPEAL

An appeal from a lower court to a higher court whereby a complete new trial takes place. All records of the former trial are irrelevant in the new proceedings.

DIVEST (or DEVEST)

To deprive; to take away.

DUE PROCESS

A constitutional guarantee requiring every person to have protection of a day in court and the benefit of general law. It requires a notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.

EASEMENT

The right of one person or entity to use the land of another for a special purpose.

EGRESS

The right or permission to exit from the property of another.

EMINENT DOMAIN

The power or right of the state, or someone acting in the name of the state and under its authority, to take private property for a public use.

FAIR MARKET VALUE or MARKET VALUE

The price property will bring when offered for sale by one who desires to sell, but is not obligated to sell and is bought by one who desires to buy but is under no necessity of buying.

FOURTEENTH AMENDMENT

An amendment to the U.S. Constitution which, among other things, secures all persons against any state action that is in deprivation of life, liberty or property without due process of law or denial of the equal protection of the laws.

INDEMNITY AGREEMENT

An agreement whereby one person secures protection from another against anticipated losses, liabilities or penalties.

INGRESS

The right or permission to enter the property of another.

PETITION

The initial pleadings in a judicial action; an application made to a court.

PRIVATE PROPERTY

Property belonging absolutely to an individual; property not belonging to the sovereign.

PUBLIC NECESSITY

A constitutional provision restricting the power of eminent domain to the amount of land absolutely needed for public purposes.

PUBLIC USE

A constitutional provision restricting the power of eminent domain on occasions where the resulting service or use shall affect the inhabitants of the community as a whole, not merely certain individuals.

RIGHT-OF-WAY

A right of passage over another person's land.

SPECIAL BENEFITS

The increase in value to a remaining tract of land due to a part of it being taken by condemnation.

SPECIAL DAMAGES

The decrease in value to a remaining tract of land due to a part of it being taken by condemnation.

SUIT or LAWSUIT

A proceeding by one person or persons against another or others in a court of justice.

UNITY-OF-USE SUBMISSION

A particular means of ascertaining market value in a partial taking. It is employed whenever the condemnation of a part of a tract of land causes the value of the condemned and uncondemned land to be less than the two tracts taken as a whole.

JURISDICTION OF TEXAS COURTS IN EMINENT DOMAIN CASES

Article 3266a of the Texas Revised Statutes

District courts, county courts at law and county courts

Section 1. The district courts of all counties in the State shall have jurisdiction *concurrent with the county courts at law in eminent domain cases. The county courts shall have no jurisdiction in eminent domain cases.

Counties without county courts at law having one district court

Section 2. In all counties where there is no county court at law with jurisdiction of eminent domain cases and there is one district court, the party desiring to initiate condemnation proceedings shall file its petition whith the district judge; and objections to the award of the special commissioners shall be filed in that district court.

Counties with county court at law

Section 3. In all counties where there is one county court at law with jurisdiction of eminent domain cases, the party desiring to initiate condemnation proceedings shall, except where otherwise specifically provided by law, file its petition with the judge of the county court at law; and objections to the award of the special commissioners shall be filed in the county court at law.

* Concurrent jurisdiction means that more than one court is authorized to hear and decide the matter. The one that actually hears and decides the case lies solely within the petitioner's discretion.

Understanding Condemnation

- Source of power
- Entities possessing the power
- Condemnation procedure

Eminent Domain and Condemnation

Eminent Domain:

Power to take private property for public use

Condemnation:

Process by which taking or appropriation occurs

© Texas Real Estate Research Center
Visual #2

Right to Exercise Eminent Domain

Authorization:

- Constitutional
- Statutory
- Procedural

Legal Restraints

- Public use
- Public necessity
- Just or adequate compensation
- Due process

Texas Real Estate Research Center
Visual #4

Damage Determinations

Fair market value of the parcel being condemned:

\+ Special damages

\- Special benefits

= Award

Due Process Procedures

- Negotiation
- Hearing
- Appeal

Texas Real Estate Research Center
Visual #6

Elements of a Court Petition

- Land description
- Purpose of condemnation
- Owner's name(s)
- Non-agreement allegation

Special Commissioners Hearing Determines:

- Market value
- Special damages
- Special benefits

Texas Real Estate Research Center
Visual #8

Appellate Procedures

- Formal written objection to special commissioners award timely filed
- Appeal tried in county court of law or district court
- Texas rules of civil procedures apply

Landowner's Costs

- Generally landowners bear all incurred costs
- Plus court costs if final award from special commissioners or trial court is ≤ condemnor's offer

Landowner's Alternatives

- Monetary considerations
- Procedural considerations
- Easement agreement provisions
- Miscellaneous considerations

Texas Real Estate Research Center
Visual #11

Landowner's Negotiation Checklist

Easement considerations:

- Location
- Width
- Longevity

Negotiation Checklist (Continued)

- Construction timetable
- Routes of ingress and egress
- Gates and cattleguards
- Crossings

Condemnor's Use of Easement

- Number of pipes or lines
- Size of pipes
- Maximum pressure or voltage
- Pipeline depth
- Substance transportable
- Replacement provisions, inspection schedules

Location Factors

- Above-ground facilities
- Backfill procedure for ditches
- Restoration and cleaning
- Type of above-ground support
- Location of support structures
- Height of powerlines
- Location of test structures

Texas Real Estate Research Center
Visual #15

Indemnity and Assignment Factors

- Protects landowner against future lawsuits caused by condemnor's actions
- Indemnity includes judgments and legal fees
- If right to assign is given
  - -- Notice must be given
  - -- Assignment cannot increase landowner's burden

Elements of Landowner's Payments

Payment for:

- Easement
- Damages to crops, timber, etc. (within easement)
- Damages to crops, timber, etc. (outside easement)

Negotiating Posture

- Support position with facts
- Be reasonable, fair and courteous
- Keep a bona fide attempt at negotiations
- Strive for out-of-court settlement
- Be cooperative with advance crews
- Photograph area before and after operations

© Texas Real Estate Research Center
Visual #18

Conclusion

- Condemnor's rights are paramount to condemnee's
  - Condemnee should act promptly and properly

© Texas Real Estate Research Center
Visual #19

INSTRUCTORS EVALUATION

In order for the Texas Real Estate Research Center to be able to better assess the effectiveness of this packet, your input is requested. Please complete this form and return it to the address provided.

CONCEPT

1. What overall rating would you give this concept?

useless 1 2 3 4 5 6 7 8 9 10 invaluable

RATING THE ELEMENTS

2. How do you rate the elements of this TIP?

Content:

too general 1 2 3 4 5 6 7 8 9 10 too technical

Amount of material:

too little 1 2 3 4 5 6 7 8 9 10 too much

Format:

too simple 1 2 3 4 5 6 7 8 9 10 too complex

STRENGTHS AND WEAKNESSES

3. What were the strengths of the package? _____

_____

_____

_____

4. What were the weaknesses of the package? _____

_____

_____

SUGGESTIONS

5. What specific changes would you like to see in future TIPs?

_____

_____

6. What additional topics would you suggest for the TIP series?

a. _____ c. _____

b. _____ d. _____

EXPECTED USE

7. Do you expect using this packet in the next three months?

_____ yes _____ no

8. If you answered "yes" to question 7, to what classes will this material be presented?

_____

_____

ADDRESS UPDATE

The mailing list for TIP is being updated constantly. To insure proper delivery, please complete this section.

Name: _____

Institution: _____

Address: _____

City _____ State _____ Zip _____

If you no longer wish to receive the TIP series, check here: _____

Please return this form to:
TIPs
Texas Real Estate Research Center
Texas A&M University
College Station, TX 77843-2115

ERIC Clearinghouse for
Junior Colleges SEP 18 1997